91-1855

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALVIN D. PEARSON, BRENDA CURTIS and CENTURY 21 PEARSON, INC. REALTORS®, an Illinois corporation,

Petitioners,

v.

JAMES R. THOMPSON, as Governor of the State of Illinois, and NEIL F. HARTIGAN, as Attorney General of the State of Illinois,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a State criminal law that singles out and restricts advertising by real estate professionals violate the First Amendment and the Equal Protection Clause?

II. Does a State criminal law that forbids solicitation of residents to list or sell their homes, but fails to define the communication it bans, violate the Due Process rights of real estate professionals when applied to communications that are not intended to persuade residents to list or sell their homes?

PARTIES

The parties to the proceeding in the Seventh Circuit Court of Appeals are:

1. Alvin D. Pearson, Plaintiff-Appellant in the court below.
2. Brenda Curtis, Plaintiff-Appellant in the court below.
3. Century 21 Pearson, Inc. Realtors®, an Illinois corporation, Plaintiff-Appellant in the court below.
4. James R. Thompson, as Governor of the State of Illinois, Defendant-Appellee in the court below. (Since the appeal was filed, James Edgar succeeded Mr. Thompson as Governor.)
5. Neil F. Hartigan, as Attorney General of the State of Illinois, Defendant-Appellee in the court below. (Since the appeal was filed, Roland W. Burris succeeded Mr. Hartigan as Attorney General.)

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
Petitioners And Their Advertising Activities	3
The Illinois Anti-Solicitation Statute	4
The Use of Anti-Solicitation Notices To Maintain Existing Racial Integration Patterns	6
Prosecution of Petitioners Pearson And Century 21 Pearson	7
Proceedings Below	8
REASONS FOR GRANTING THE WRIT	11
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SIXTH CIRCUIT AND THIS COURT BECAUSE IT UPHOLDS A LAW THAT DISCRIMINATES AMONG SPEAKERS BASED ON THEIR VIEWPOINTS AND GRANTS STANDARDLESS DISCRETION TO LOCAL OFFICIALS	11

II. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW BECAUSE IT PERMITS THE READY CIRCUMVENTION OF THE *CENTRAL HUDSON/FOX* TEST 15

III. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO REDRESS THE LOWER COURTS' REFUSAL TO CONSIDER THE FACTS OF PETITIONERS' CASE . 18

CONCLUSION 19

APPENDIX

(Separate Volume)

APP. PAGE

1. Order of Court of Appeals, dated February 13, 1992 1
2. Judgment of Court of Appeals, dated February 13, 1992 5
3. Order of District Court denying Plaintiffs' motion to vacate, dated September 14, 1989 ... 6
4. Opinion of District Court, dated July 25, 1989 . 9
5. Judgment of District Court, dated July 25, 1989 13
6. Opinion of Court of Appeals, *Curtis v. Thompson*, dated February 7, 1988 14
7. Judgment of Court of Appeals, *Curtis v. Thompson*, dated February 7, 1988 47
8. Order of District Court, dated October 24, 1986 48
9. Petitioners' Amended Verified Complaint, leave to file granted September 14, 1989 50
10. Statute Involved, Ill. Rev. Stat. ch. 38, ¶70-51 74

TABLE OF AUTHORITIES

Cases	Page
Board of Trustees v. Fox, 492 U.S. 469 (1989) ...	15, 17
Central Hudson Gas and Electric Co. v. Public Service Comm'n, 447 U.S. 557 (1980)	13, 15, 17
Connally v. General Construction Co., 269 U.S. 385 (1926)	14
Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985)	16
Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464 (6th Cir. 1991), *cert. granted*, No. 91-1200 (March 9, 1992)	12, 13
Grayned v. City of Rockford, 408 U.S. 104 (1972) .	14
Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) ..	14
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)	16
Penny Saver Publications v. Village of Hazel Crest, 905 F.2d 150 (7th Cir. 1990)	13
People v. C. Betts Realtors, 66 Ill. 2d 144, 361 N.E.2d 581 (1977)	6
Pierce v. United States, 314 U.S. 306 (1941) ...	15
Rowan v. Post Office Dept., 397 U.S. 728 (1970)	8, 9, 17
South Suburban Housing Center v. Greater South Suburban Board of Realtors, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, No. 91-925 (Jan. 27, 1992)	13, 16
University of Texas v. Camenisch, 451 U.S. 390 (1981)	19

Statutes

28 U.S.C. §1254(1) 2
42 U.S.C. §3604(e) 11
Ill. Rev. Stat. ch. 38, ¶70-51(d) ..... *passim*
Ill. Rev. Stat. ch. 38, ¶70-52 5
Ill. Rev. Stat. ch. 38, ¶70-53 5
Ill. Rev. Stat. ch. 38, ¶1005-8-1 5
Ill. Rev. Stat. ch. 38, ¶1005-8-3 5
Ill. Rev. Stat. ch. 38, ¶1005-9-1 5

Other

Black's Law Dictionary, (5th Ed. 1979) 14

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Alvin D. Pearson, Brenda Curtis and Century 21 Pearson, Inc. Realtors®, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on February 13, 1992.

OPINIONS BELOW

This Petition seeks review following two appeals below.

The first opinion of the Court of Appeals for the Seventh Circuit is published, *Curtis v. Thompson*, 840 F.2d 1291,

and is reprinted in the Appendix hereto, p. 14 (hereinafter cited as "App., p. ____"). The first opinion of the United States District Court for the Northern District of Illinois is unpublished and is reprinted in the Appendix, p. 48.

The second opinion of the Court of Appeals is unpublished and is reprinted in the Appendix, p. 1. The second opinion of the District Court also is unpublished and is reprinted in the Appendix, p. 9.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1992. (App., p. 5.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Fourteenth Amendment:

> §1. ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws."

Illinois Revised Statutes, chapter 38, paragraph 70-51(d):

> "§1. Inducements to sell or purchase by reason of race, color, religion, national origin, ancestry, creed, handicap, or sex—Prohibition of Solicitation. It shall be unlawful for any person or corporation knowingly:
>
> * * *
>
> (d) To solicit any owner of residential property to sell or list such residential property at any time after

such person or corporation has notice that such owner does not desire to sell such residential property . . . ."

(Paragraph 70-51 is reprinted in its entirety in the Appendix, pp. 74-75.)

STATEMENT OF THE CASE

Petitioners And Their Advertising Activities

Petitioner Alvin D. Pearson ("Pearson") is a licensed real estate broker serving the south and southwest sides of the City of Chicago and its southern suburbs (R-80, ex. 1 at ¶2.)[1] Pearson is Past President of the Greater South Suburban Board of Realtors®. He has served on the Equal Opportunity Committee of that Board and of the National and Illinois Associations of Realtors® as well. Petitioner Century 21 Pearson, Inc. Realtors® ("Century 21 Pearson") is a real estate brokerage business owned and operated by Pearson. (*Id.*) Petitioner Brenda Curtis is employed by Century 21 Pearson as its Sales Manager. (*Id.*, Ex. 2 at ¶2.)

Like other real estate brokers,[2] Petitioners employ a variety of advertising and solicitation techniques to inform the public about themselves and their services. (*See, e.g.*, R-80, ex. 1 at ¶17, exs. 1c-1u, ex. 4 at ¶¶3-4, exs. 4b-4n.) Much of this communication does not seek to induce resi-

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[1] Petitioners cite the record below as "R-____." Record item R-80 is Petitioners' submission of affidavits and exhibits in preparation for a trial on an agreed record, which was never held. *See* infra, pp. 9-10.

[2] Petitioners use the term "brokers" to refer to all professionals engaged in the business of real estate brokerage, including licensed brokers and their employees, sales agents and independent contractors.

dents to list or sell their properties. For example, brokers promote their efforts to sell homes already listed with them. (*E.g.*, *Id.*, exs. 1e, 1i, 1j, 1t, 2b.) Brokers also advertise their mortgage brokerage, appraisal, investment, and commercial leasing and sales services. (*Id.*, ex. 1 at ¶17, ex. 4 at ¶4, exs. 4b, 4f, 4i, 4l.) Brokers also distribute flyers and the like asking residents if they have already decided to sell their homes (*e.g.*, *Id.*, ex. 2c; *see id.*, ex. 1 at ¶6), and encouraging those who have decided to sell to contact the broker. (*E.g.*, *Id.*, exs. 4c, 4g, 4m.) Finally, much of the advertising used by brokers is general goodwill advertising designed to foster name recognition and to promote all of their various services, not to induce anyone to sell or list his or her home. (*E.g.*, *Id.*, exs. 4b, 4h, 8b, 8c.)

The Illinois Anti-Solicitation Statute

Paragraph 70-51(d) of *Ill. Rev. Stat.* ch. 38 ("¶70-51(d)" or "the Statute") forbids and makes it a crime for any person or corporation:

> To solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property.

The notice needed to trigger this prohibition may be given by individual homeowners. More commonly, however, community organizations or elected officials solicit homeowners to participate in organized notice drives. (R-80, ex. 1 at ¶16.) Service of notice lists compiled by such drives is discretionary; organizations or officials who compile the lists can choose to serve any broker for any reason.

Paragraph 70-51(d) contains no definition of solicitation, and the State's Attorney of Cook County ("the State's

Attorney," a former defendant in this case and the most frequent prosecutor of solicitation cases) maintains no guidelines defining the offense of real estate solicitation. Prosecutors have charged brokers who distributed goodwill advertising bearing Thanksgiving turkey recipes or weatherstripping tips. (R-80, ex. 8 at ¶¶5-7.) (Although a state judge dismissed these prosecutions, the State argues in its appellate brief that "the Statute truly does apply to" those advertisements. Brief of Defendants-Appellees, pp. 28, 34.)

Paragraph 70-51(d) bans communications at any place or time. (*Curtis v. Thompson*, App., p. 44 (Ripple, J., dissenting).) The Statute thus would subject to prosecution a real estate broker who placed flyers on the windshields of cars at a shopping mall or handed them to pedestrians as they passed her office. The Statute would preclude a real estate broker from discussing market conditions with neighbors at a baseball game.

Paragraph 70-51(d) carries a penalty of up to one year in prison and a fine of up to $1000 for a first offense. *Ill. Rev. Stat.* ch. 38, ¶¶70-52, 1005-8-3(a)(1), 1005-9-1(a)(2). A second offense increases the penalty to imprisonment for one to three years and a fine of up to $10,000. *Id.*, ¶¶70-52, 1005-8-1(a)(7), 1005-9-1(a)(1). The Statute requires the Illinois Department of Registration to *revoke* a defendant's Certificate of Registration as a real estate broker upon conviction for a single offense, hence depriving him of his ability to practice his profession and make a living. *Id.*, ¶70-53.

Paragraph 70-51(d) is an amendment to a statute that prohibits "inducements to sell or purchase by reason of race, color, national origin, ancestry, creed, handicap, or sex." *Id.*, ¶70-51(1), App., p. 74. The Illinois Supreme

Court has held that the purpose of ¶70-51(d) is to prevent "blockbusting" or "panic peddling." *People v. C. Betts Realtors*, 66 Ill. 2d 144, 361 N.E.2d 581, 583-84 (1977). The District Court reached the same conclusion below. (App., p. 10.) Neither ¶70-51(d) nor its legislative history mentions the word "privacy."

The Use of Anti-Solicitation Notices To Maintain Existing Racial Integration Patterns

Much of Petitioners' homeseeking clientele, like Petitioners, is black. (R-80, ex. 10 at ¶75; App., p. 66 at ¶69; *see* R-80, ex. 4 at ¶10 (black brokers generally tend to serve black homeseekers).) Some of Petitioners' customers hope to locate housing in predominantly white communities. Like other black-owned businesses trying to establish a presence in predominantly white communities, Petitioners rely heavily on direct advertising—such as mailings and flyers—to build a network of business contacts. (R-80, ex. 4 at ¶¶9-11.)

One of the predominantly white communities where Petitioners would like to practice their trade is the Beverly section of Chicago. The Beverly Area Planning Association ("BAPA") is a community organization that seeks to preserve the current racial composition of Beverly. (BAPA was a defendant below, and concluded its involvement by consent decree.) For example, BAPA encourages residents who plan to sell a home in Beverly to list the property with a "preferred" real estate broker, that is, a broker who agrees to assist BAPA's efforts to preserve the racial status quo. Such assistance may include refusing to cooperate with black brokers such as Petitioners (*Id.*, ex. 1 at ¶20) and withholding the property from local computerized multiple listing services (*Id.*, ex. 5 at ¶4), which

eliminates a color-blind means of locating housing in Beverly.

BAPA's effort to limit access to housing information in Beverly includes solicitation of residents to sign its anti-solicitation list. After collecting a list of those residents who agreed to participate in BAPA's campaign against "non-preferred" and outside real estate brokers, BAPA scrambled its list to complicate brokers' compliance. BAPA then served the scrambled list on Century 21 Pearson. (*Id.*, ex. 1 at ¶16.) Unable to justify the high cost of working with a scrambled list and afraid of the draconian penalty possible for even an inadvertent first offense (imprisonment and loss of professional license), Petitioners decided to refrain from contacting any Beverly resident.

Prosecution of Petitioners Pearson And Century 21 Pearson

Subsequently, Mardie Brown began working as an independent contractor for Century 21 Pearson. His first assignment was to telephone residents of the Damen neighborhood—which is adjacent to Beverly—to inquire whether they were planning to move in the next two years. Brown did not know where the Damen area meets Beverly, however, and inadvertently phoned several Beverly residents, some of whom had agreed to participate in BAPA's anti-solicitation effort. BAPA urged the State's Attorney to prosecute. The State's Attorney did not prosecute for sixteen months, but then, shortly after Pearson moved his office to a prominent location on the edge of Beverly, the State's Attorney charged Brown, Pearson and Century 21 Pearson with "knowingly" violating ¶70-51(d). (Petitioner Brenda Curtis was not charged.) (App., pp. 61-66.)

Proceedings Below

Petitioners then filed their Verified Complaint, seeking a declaration that ¶70-51(d) violates their First Amendment, due process and equal protection rights. The District Court initially dismissed, but then reinstated and stayed, the actions of Petitioners Pearson and Century 21 Pearson because of the pendency of state prosecutions. (App., pp. 48-49.) As to Petitioner Curtis, the court denied a motion by Defendant to dismiss her action for failure to state a claim. (*Id.*, p. 49.) Although the District Court held no evidentiary hearing and made no findings of fact, it also denied Curtis' motion for a preliminary injunction against the Statute's enforcement "because she cannot demonstrate a likelihood of success on the merits." (*Id.*) Curtis appealed.

A divided Court of Appeals affirmed. (App., p. 14, 840 F.2d 1291 ("the *Curtis* decision").) Judge Coffey's opinion held that the District Court properly denied Curtis' motion without an evidentiary hearing because her Complaint created "less than a negligible chance of success on the merits." Judge Coffey acknowledged "Curtis raises an interesting question . . . whether the regulation does advance the government's interest in a meaningful way to prevent blockbusting . . . ." (App., p. 27.) Judge Coffey ruled, however, that ¶70-51(d) directly and narrowly advances another interest "the state of Illinois argues is served by the statute: the interest in insuring the privacy of the homeowner." (*Id.*) Judge Coffey relied heavily on *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). There the Court upheld a federal statute that provides a procedure by which any household may bar unsolicited mailings "which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." (App., p. 30.)

Judge Eschbach concurred "in the result" but rejected the principal basis of Judge Coffey's opinion: his reliance on *Rowan v. Post Office Dept.* (*Id.*, p. 40.) Judge Eschbach distinguished *Rowan* on the ground that the federal statute was content-neutral, while "the Illinois statute at issue in the present case cannot be construed as content neutral because it clearly proscribes one type of communication (real estate solicitations) and mandates criminal penalties for violation of that proscription." (*Id.*) Judge Ripple dissented, agreeing with Judge Eschbach that *Rowan* did not control the outcome. (*Id.*, p. 45.) Judge Ripple also noted that the restriction on solicitation by real estate brokers alone is "a rather feeble approach" to the protection of residential privacy and that ¶70-51(d) "prevents—apparently—all real estate solicitation at any place (not just the home) at any time by anyone." (*Id.*, p. 44.)

The case then returned to the District Court for a decision on the merits. BAPA entered into a consent decree by which it agreed not to scramble its anti-solicitation list and to refrain from referring inadvertent first-time violations to the State's Attorney. The State's Attorney entered into a stipulation of dismissal under which he agreed to be bound by the ultimate judgment in the case. Petitioners Pearson and Century 21 Pearson resumed their participation in the case following the discharge of the criminal complaint against them.

The District Court initially rejected the State's assertion that the Court of Appeals' *Curtis* decision required dismissal of Petitioners' Verified Complaint, and ordered the parties to submit the case for a decision on the merits. Petitioners and the State agreed to submit the case upon a record consisting of affidavit testimony and supporting

exhibits. Petitioners' evidence consisted of affidavit testimony from seven witnesses, including five experts, and dozens of exhibits. (R-80.) The State submitted the affidavit of one expert. (The parties' evidence is summarized *infra* at pp. 18-19.) None of this evidence was before either the District Court or the Court of Appeals at the time of the preliminary injunction rulings.

The District Court scheduled an evidentiary hearing on the merits, but then entered judgment dismissing Petitioners' Complaint before holding the hearing, on the ground that the *Curtis* decision precluded its consideration of the Petitioners' evidence. (App., p. 12.) On Petitioners' motion following entry of its judgment, the District Court deemed Petitioners' Verified Complaint to be amended to conform to the evidence, but refused to vacate its judgment. (App., p. 7.) Petitioners' amended complaint is reprinted in the Appendix at pp. 50-73. The Court of Appeals affirmed, holding that its decision on Curtis' preliminary injunction motion established the law of the case and therefore Petitioners' "complaint was insufficient as a matter of law (regardless of the facts) . . . ." (App., p. 4.)

REASONS FOR GRANTING THE WRIT

Refusing to pause to consider the facts establishing Petitioners' claim, the courts below summarily upheld ¶70-51(d) on grounds so broad and so illusory that their decision effectively strips commercial speakers of any protection against viewpoint discrimination under the First Amendment and the Equal Protection Clause. The lower courts' decision also deprives Petitioners of any statutory warning as to which communications may subject them to serious criminal punishment. Petitioners respectively suggest a decision of such gravity deserves fuller consideration than their claim received below.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SIXTH CIRCUIT AND THIS COURT BECAUSE IT UPHOLDS A LAW THAT DISCRIMINATES AMONG SPEAKERS BASED ON THEIR VIEWPOINTS AND GRANTS STANDARDLESS DISCRETION TO LOCAL OFFICIALS.

Paragraph 70-51(d) discriminates on the basis of viewpoint. The law silences only real estate brokers; all other commercial and non-commercial speakers remain free to solicit residents in Illinois. The law does not even extend to the general topic of real estate; for example, building contractors may urge residents to remodel or redecorate instead of moving. The State offered no evidence that real estate advertising intrudes on residential privacy to a greater degree than any other viewpoint. (*Curtis v. Thompson*, App., p. 36 (Ripple, J., dissenting).) Instead, it is apparent that the State singled out real estate advertising because it may enable blacks to find housing in predominantly white neighborhoods. (Other subsections of ¶70-51, however, directly prohibit steering, panic peddling and blockbusting activities, App. at 74, as does federal law, 42 U.S.C. §3604(e).)

In *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991), *cert. granted*, No. 91-1200 (March 9, 1992), the Sixth Circuit Court of Appeals held unconstitutional a city regulation banning—for aesthetic reasons—sidewalk newsboxes offering commercial advertising, including a magazine listing residential properties for sale. The court observed that commercial speech may be regulated differently than non-commercial speech only when the regulations deal with the potentially false or misleading content of the speech itself, or with distinctive adverse effects that the speech will produce. *Id.* at 469-70. Because the City regulation did not seek to ban speech that is inherently misleading, or to alleviate adverse effects allegedly caused by and flowing directly from the type of speech regulated, the court ruled that the regulation did not "reasonably fit" the City's interest in aesthetics. *Id.* at 470.

The decision below conflicts directly with *Discovery Network* in one respect, but differs in another, equally important respect. The regulation at issue in each case draws a distinction among speakers that is at best distantly related to the broad governmental interest it purportedly seeks to advance. No quality inherent in "commercial speech" makes it more offensive to aesthetic interests than non-commercial speech; the same is true of the relationship between real estate advertising and residential privacy. Hence the opposite outcomes in these cases are irreconcilable. The cases differ, however, in that the Cincinnati regulation affects a broad category of speech—that proposing a commercial transaction—while the Illinois criminal statute singles out a discrete group of speakers whose message is disfavored on racial grounds, because it may assist black homeseekers to find housing in predominantly white communities.

If this Court affirms the *Discovery Network* decision, it should reverse the decision below *a fortiori*. Viewpoint discrimination is significantly more offensive to First Amendment values than is a distinction between commercial and non-commercial speech, and hence less defensible on broad, unrelated grounds such as privacy. *E.g.*, *Central Hudson Gas and Electric Co. v. Public Service Comm'n*, 447 U.S. 557, 574-75 (1980) (Blackmun, J., concurring) (even though "commercial speech" is involved, suppression of information to dampen demand for a legally offered product "strikes at the heart of the First Amendment"). But if this Court should reverse *Discovery Network* based on the pragmatic distinctions between commercial and non-commercial speech, it should use this case as a vehicle to reaffirm the First Amendment's disfavor of regulations that silence a single group because of popular hostility to its viewpoint, even in the context of commercial speech.

The decision below also conflicts irreconcilably with this Court's due process jurisprudence. Paragraph 70-51(d) forbids real estate professionals "to solicit any owner of residential property to sell or list such residential property . . . ," but contains no definition of the term "solicit." *Cf. South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F.2d 868, 895 (7th Cir. 1991), *cert. denied*, No. 91-925 (Jan. 27, 1992) (upholding anti-solicitation ordinances containing eight-part definition of "solicitation"); *Penny Saver Publications v. Village of Hazel Crest*, 905 F.2d 150, 155 (7th Cir. 1990) (holding unconstitutionally vague an anti-solicitation ordinance containing definition that failed to inform real estate brokers whether it prohibited advertisements in media of general circulation). Uncontroverted evidence presented by Petitioners, but not considered below (*see infra*, pp.

18-19), establishes that state prosecutors maintain no guidelines defining solicitation, and frequently prosecute general goodwill and other advertising that does not attempt to induce anyone to sell or list property. (R-80, ex. 8.) Brokers, the attorneys who advise them, and prosecutors all grope in the dark for the Statute's meaning, influenced as much by political pressure from community organizations as by the intent of the Illinois General Assembly. (*Id.*)

The failure to define "solicit" thus vests broad, standardless discretion in local officials. It also forces brokers to guess whether a particular flyer and the political climate surrounding its use will trigger a prosecution. The decision below upholding this law conflicts with this Court's rulings in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 & n.5 (1972), and *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). *See also Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) ("The general test of vagueness applies with particular force in review of laws dealing with speech").

Attempting to "remedy" this defect, the Court of Appeals ruled that brokers must refrain from *all* communication with residents, whatever its purpose:

> In this case appellant knows precisely what she must refrain from doing upon receipt of statutory notice. The complainants' (sic) names must be removed from any mailing list the broker may have, and the broker must refrain from future communications to the named addressee.

(App., p. 37 n.12.) A broker or his attorney who sought guidance from *Black's Law Dictionary*, however, would learn that "solicit" means:

> To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose

> of receiving; . . . The term implies a personal petition and importunity addressed to a particular individual to do some particular thing.

Id. at 1248-49 (5th Ed. 1979). Paragraph 70-51(d) says the particular thing one may not entreat residents to do is to list or sell their homes. The Statute's terms thus offer no warning that one must refrain from *all* future communications with residents even if the purpose is simply to advise residents of one's existence and invite inquiry about any of one's services, which include many things other than listing homes. By *broadening* the Statute's scope in order to cure its vagueness, the decision below conflicts directly with *Pierce v. United States*, 314 U.S. 306, 311 (1941) ("judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness").

II. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW BECAUSE IT PERMITS THE READY CIRCUMVENTION OF THE *CENTRAL HUDSON/FOX* TEST.

The Court's decisions in *Central Hudson Gas and Electric Co. v. Public Service Comm'n*, 447 U.S. 557 (1980), and *Board of Trustees v. Fox*, 492 U.S. 469 (1989), establish the requirements for a valid restriction on commercial speech. To qualify for First Amendment protection, the speech must concern lawful activity and not be misleading. If the speech qualifies, the government must prove that its asserted interest is substantial, that the regulation directly advances the interest asserted, and that the regulation employs a means narrowly tailored to achieve the government's interest. 447 U.S. at 566; *see* 492 U.S. at 480.

The decision below accepts formalistic responses to the second, third and fourth prongs of this test, effectively draining them of all substance. By doing so, it opens the way to a limitless range of content- and viewpoint-based restrictions on commercial speech.

The record contains no hint that a concern for residential privacy entered the mind of even a single legislator who voted to enact Paragraph 70-51(d). The General Assembly passed the law solely to prohibit blockbusting and panic peddling, and predominantly white communities that fear white flight have used it to discourage blacks from moving in by prohibiting otherwise lawful speech. *See South Suburban Housing Center*, 935 F.2d at 876 (purpose of municipal anti-solicitation laws modeled after ¶70-51(d) was to keep residents from questioning the racial stability of their communities or re-evaluating their decision to live there and to reduce the ability of homeseekers to find homes in the municipalities). Nevertheless, the Court of Appeals unquestioningly accepted the argument of the State's lawyer that privacy concerns underlie Paragraph 70-51(d). (App., p. 27.)

Like an asserted interest in aesthetics, privacy is a facially reasonable justification for denying a speaker access to a forum that may conceal viewpoint-based discrimination. *See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (courts must carefully scrutinize asserted aesthetic judgments "to determine if they are only a public rationalization of an impermissible purpose"). To a government seeking to restrict speech, privacy has the additional advantage of near universal utility. Virtually any restriction on speech incrementally advances a privacy interest by reducing the total volume of speech reaching listeners; this fact enabled

the court below to dismiss Petitioners' objection to being singled out as "mere underinclusiveness." (App. at 34.)

If the *Central Hudson/Fox* test does not require meaningful scrutiny when government asserts broad-gauged justifications such as privacy and aesthetics, then the First Amendment effectively offers no protection against viewpoint-based restrictions on commercial speech. Government can pursue any number of "public policies" under the guise of "privacy," driving out any business that piques local prejudice or disfavor. Indeed, if "privacy" justifies a law designed to discourage blacks from moving to white communities, then it could be used as readily to silence Korean grocers or South Asian convenience store owners.

The decision below also eviscerates the "reasonable fit" element of the *Central Hudson/Fox* test. Judge Coffey's opinion in *Curtis* holds that ¶70-51(d) satisfies this requirement because it allows residents to choose whether to bar real estate solicitations, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). (Although Judges Eschbach and Ripple both felt *Rowan* must be distinguished because the statute at issue there was content-neutral, the Court of Appeals subsequently declared Judge Coffey's view the law of the case. App., p. 4.) The purported "fit" between ¶70-51(d) and the State's asserted interest in privacy is illusory, however, because the law allows residents to insulate themselves from only one viewpoint that is selected by the State, rather than from any topic that might offend their privacy. *Contra Rowan*, 397 U.S. at 738 ("In operative effect the power of the householder is unlimited . . . . Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting power to make any discretionary evaluation of the material in a governmental official"). If the illusory fit between ¶70-51(d) and

privacy concerns is reasonable, then government can shield from judicial review any form of viewpoint discrimination simply by requiring residents to opt into the government's discriminatory scheme.

III. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO REDRESS THE LOWER COURTS' REFUSAL TO CONSIDER THE FACTS OF PETITIONERS' CASE.

The courts below denied Brenda Curtis' motion for a preliminary injunction on the ground that, as a matter of law, her original complaint had less than a negligible chance of succeeding on its merits. (App., pp. 14, 49.) (Incongruously, the District Court simultaneously *denied* the defendants' motion to dismiss Curtis' action for failure to state a claim. App., p. 48.) Consequently, Curtis received no opportunity to have either court below consider the facts establishing the merits of her claim.

When the case returned to the District Court for a decision on the merits, the parties submitted the case on an agreed record consisting of affidavits and exhibits. The evidence introduced by Petitioners establishes numerous facts at odds with those assumed by Judge Coffey in his *Curtis* decision: (1) Petitioners and other real estate brokers use many advertising materials and techniques which do not urge residents to sell or list their homes; (2) prosecutors frequently charge brokers with violations of ¶70-51(d) for using such advertising; (3) brokers and their attorneys cannot predict with confidence whether any given piece of material or technique will trigger a prosecution; (4) the principal use of ¶70-51(d) is to discourage blacks from moving to predominantly white communities, not to advance privacy concerns; and (5) enforcement of ¶70-51(d) effectively precludes brokers from

communicating with residents who do *not* sign anti-solicitation notices. The State's evidence controverted none of these facts; it sought instead to justify ¶70-51(d) solely as an anti-blockbusting measure.

The courts below refused to consider the facts submitted by Petitioners and no findings of fact of any kind were made or reviewed. Both courts held that Judge Coffey's *Curtis* opinion was the law of the case. *Contra University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (findings of fact *and conclusions of law* rendered in a preliminary injunction proceeding are not binding at a trial on the merits). Because these facts raise issues not addressed in the *Curtis* opinion, the lower courts' refusal to consider them denied Petitioners a fair hearing of their claim.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals should be granted.

Respectfully submitted,

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